

CRIMINAL APPEAL NO.885 OF 1987.

Date of decision: 23.1.1996.

For approval and signature

The Honourable Mr. Justice R. R. Jain

and

The Honourable Mr. Justice H. R. Shelat

Mr. D.F. Amin, advocate for the appellant.

Mr. K.P. Raval, A.P.P. for respondent-State.

1. Whether Reporters of Local Papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

Coram: R.R.Jain & H.R. Shelat, JJ.

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January 23, 1996.

Oral judgment (Per Jain, J.)

Appellant/accused has preferred this appeal against the judgment and order of conviction and sentence passed by learned Additional Sessions Judge, Kutch at Bhuj, on 30.10.1987 in Sessions Case No.16/87, for the offence under Section 302 of the Indian Penal Code, awarding sentence of rigorous imprisonment for life.

According to the prosecution case, some bitterness

prevailed between the complainant-deceased and the accused as his sister's betrothal with brother of the complainant was broken owing to family dispute. The prosecution has alleged that on 28.12.1986, at about 1.15 P.M. when the complainant-deceased Husain, son of Mohamad Malek, was standing near a cabin, chitchatting with his friends, the accused came from behind and gave knife blow to the complainant-deceased below the chest portion and as a result of which he fell down. He was removed to hospital where he was operated and he survived for 9 days and on the 10th day he travelled for heavenly abode. As a result of death of the complainant, the accused was chargesheeted for the offence punishable under Section 302 of the Indian Penal Code on 26.8.1987 and he was put to trial. As the charges levelled against the accused were proved, the learned Additional Sessions Judge sentenced him to undergo rigorous imprisonment for life. Being aggrieved and dissatisfied with the order of conviction and sentence passed by the learned Additional Sessions Judge, the accused has preferred this appeal and that is how we are seized of this matter at this stage.

We have heard Mr. D.F. Amin, learned advocate for the appellant and Mr. K.P. Raval, learned A.P.P. for the Prosecution.

Mr. Amin, learned advocate for the appellant, has not disputed the death being a homicidal death. Of course, he has also tried to assail conviction on merits but in substance, his submission is that the case does not fall within the purview of Section 302 of the Indian Penal Code but is covered by Section 304 of the Indian Penal Code and the accused could have been convicted for the offence under Section 304 of the Indian Penal Code only.

Mr. Raval, learned A.P.P., inviting our attention to the oral evidence of eye witnesses and relying upon the medical evidence, has vehemently argued that the case squarely falls within the ambit of Section 302 of the Indian Penal Code and the learned Additional Sessions Judge was right in convicting the accused accordingly.

We have carefully gone through the evidence on record. Our attention is drawn to oral evidence of Prosecution Witness No.4, Dr.Kamlesh Dayaram Vegad, Ex.13. The witness is the doctor who had treated the deceased-complainant in the hospital and had issued injury certificate. Our attention is also drawn to the evidence of P.W.No.9, Dr. Vinod Chhabilal Dave, Ex.36, who had produced the post-mortem report. A bare look at the evidence of both the above witnesses, namely,

doctors, paves way for leading us to hold that at the outset the case falls within the purview of Section 304 of the Indian Penal Code and not under Section 302 of the Indian Penal Code. It is true that the nature of injury was grave, serious and sufficient to cause death in ordinary course of nature as is opined by P.W.No.4 at Ex.13. But the fact that immediately after the incident he was brought to the hospital and treated to bring him out of immediate danger of death should not escape our mind. The fact that deceased-complainant survived for 9 days after the incident and on the 10th day of the incident he expired, would also be very relevant for our purpose. We have no hesitation in lending support to the learned advocate for the appellant that since the complainant was operated he came out of danger and survived for 9 days and, therefore, despite serious injury, the injury by itself could not be the direct cause of death.

This fact takes us to the circumstance under which the incident took place, i.e., giving of sudden and single blow resulting into injury on the left side of abdomen as is evident from column No.17 of post-mortem notes, Ex.37. Mr. Amin has argued that with this injury followed by prompt treatment and operation the deceased could not have died and, therefore, the death cannot be attributed to this injury only. Our attention is also drawn to medical evidence at Ex.13, wherein P.W.No.4, Dr. Kamlesh Dayaram Vegad, in his cross-examination has categorically opined that the death was due to septicaemia; meaning thereby, blood poisoning. In para 3 of his cross-examination, he has also deposed that in the age of advanced technology, septicaemia (blood poisoning), a severe type of infection, could have been prevented had proper care and treatment been given at the appropriate time. When the learned A.P.P. Mr. Raval was confronted with this medical opinion, he had no answer and was unable to connect death with the injury. In paragraph 4, the doctor has further stated that such cases of septicaemia are not uncommon to Government Hospital, Bhuj, since one or two cases are reported every month. If this be so, we have no hesitation in holding that septicaemia is a subsequent development and can be attributed to negligence of medical authority. We can further say that had proper treatment been given and care been taken, septicaemia could have been controlled and cured and as a consequence thereof death could have been avoided. What is septicaemia, how does it occur and what is the treatment, etc.? are further explained by the P.W. No.9, Dr. Vinod Chhabilal Dave, at Ex.36. Post-mortem note, Ex.37, was got produced on record

through this witness. During his cross-examination, in para 4 of his deposition, he has further stated that at the time of operation if due care is not taken, may result into infection and then ultimately proliferation thereof resulting into septicaemia, that is, blood poisoning. This witness has also opined that in this age of advanced technology, septicaemia could have been controlled and cured. Not only cured but could have been prevented by giving proper treatment. Accepting this piece of evidence and the evidence in the nature of experts' opinion, we are unable to convince ourselves to uphold the conviction under Section 302 as passed by the learned Additional Sessions Judge.

Since it is a case of single blow coupled with evidence of medical negligence and as nothing has come on record as to the intention of the accused and the fact that the injured complainant survived for 9 days after the incident and died on the 10th day, we are of the view that it is a fit case wherein conviction under Section 304 of the Indian Penal Code should have been passed.

In this view of the facts, while upholding conviction, we alter conviction from that of Under Section 302 to Section 304 of the Indian Penal Code and accordingly the order of conviction is required to be passed.

We are informed that the accused is in jail since 31.12.1986 and by this time he has completed 9 years in jail and at no point of time he has ever been released on bail till today. The maximum imprisonment which can be awarded for the offence under Section 304 Part II of the Indian Penal Code is 10 years or with fine. Taking extreme view, even if we award sentence on higher side, it cannot be more than ten years. As stated earlier, in this case, the accused has already undergone sentence for a period of nine years and the same would be appropriate sentence for offence punishable under Section 304 Part II of the Indian Penal Code.

For the reasons stated above, we pass following order:

The appeal is partly allowed.

The order of conviction and sentence passed by the learned Additional Sessions Judge, Kutch at Bhuj for the offence under Section 302 of Indian Penal Code is quashed and set aside. The accused/appellant is held guilty for offence punishable under Section 304 Part II of the Indian Penal Code and sentenced to undergo the imprisonment for the period which he has already undergone till today. The accused/appellant is ordered

to be set free forthwith if he is not required to be  
detained in connection with any other case.